According to the affidavit of Mr. Hinchey, assistant to the prosecutor, filed in the court by the latter, the prosecutor when preparing Walker to testify as his witness had before him Walker's application for the alteration of said brownstone filed by Walker with the City of New York *on January 21, 1959,* in which Walker, an experienced real estate broker, well informed as to the meaning of all real estate terms, certified to the City that "Amcol Residences, Inc. * * * *is sole owner of*" said brownstone. Walker's architect, Kraus, certified that Amcol "*is the owner in fee*" of said brownstone. Both certified *that the only persons "interested* in said premises and projected multiple dwelling" were Walker and his secretary Hawkins. The application was signed by Walker as "*owner*". Walker correctly omitted the petitioner, as he was a mere mortgagee (R. pp. 11, 12 and 13).

The prosecutor brought the application into the Court on February 19, March 15 and April 5, 1960, but did not bring it on the day of trial, April 20, 1960 (R. p. 11). On that day, the prosecutor produced Walker as his only witness, who testified that the deed, the mortgage and the bond were executed by him between March 13 and 19, 1959 (R. p. 10). The petitioner never saw the said Walker's application until after the trial (R. p. 13). On the trial, Mr. Justice Creel, one of the judges of the Court of Special Sessions, said:

> "Mr. Komar, might suggest to you, you are not going to be able to prove through this witness that these documents were executed at any other time than that date of March, which he (Walker) keeps repeating" (R. p. 10).

The prosecutor, who held the original application of Walker, filed with the City asserting that on January 21, 1959 title was in Amcol Residences, Inc. and that Walker as its sole stockholder was "owner" of the brownstone,

deliberately withheld the production and the tender to the Court of this exculpatory evidence, conclusively establishing the perjury of Walker.

Furthermore, the prosecutor according to the affidavit of his assistant, Mr. Hinchey (R. p. 11), knowingly and deliberately tendered perjured testimony on the only question of fact involved in the prosecution of your petitioner (R. p. 13).

Petitioner, a reputable lawyer of fifty years' standing, testified that the deed, mortgage and the bond were all executed and delivered on January 8, 1959. The notary public, also a reputable lawyer of thirty years of practice, corroborated petitioner. The Court of Special Sessions rejected the documentary proof and the said oral testimony, and said:

> "Justice Ringel: In imposing sentence in this case, Mr. Komar, the Court is taking into consideration that this Bench has recommended certain action by the Bar Association in your case, as well as further investigation for further action with respect to some suspicions of perjury on the trial of this case * * *" (R. p. 8).

Thus, withholding by the prosecutor of said Walker's application for the alteration of said brownstone resulted in the destruction of the credibility of the documentary and oral proof of petitioner, and in his conviction by false and perjured testimony of a single uncorrborated witness for the prosecution deliberately coached to render perjured testimony (R. p. 13), probably in exchange for immunity from prosecution as vice-president of Amcol Residences, Inc., the owner, an officer thereof actually in charge of the brownstone and responsible for its condition.

After trial, petitioner procured said application of Walker of January 21, 1959 from the city records, and

moved for a new trial, which motion was denied (R. p. 13). The petitioner appealed from his conviction and the denial of said motion urging the grounds of important new evidence and unethical conduct of the prosecutor, but through honest oversight omitting any constitutional violation grounds. The conviction was affirmed (14 App. Div. (2) 837). This is admitted by the respondent in its answer to *coram nobis* petition, where it said:

> "The only perceptible difference is *that he now cloaks his defenses with the veil of deprivation of his constitutional rights*" (R. p. 17).

Petition *coram nobis* was expressly based (R. p. 8) on the violation of due process of law on the trial herein by the prosecutor in tendering to the court known perjured testimony on the only fact tried in the case (R. pp. 19-20), as guaranteed by the Fourteenth Amendment to the United States Constitution. The questions of federal constitutional law were fully briefed and argued in all state courts. The answer as shown by the record is an independent adequate state procedural ground, apparently held by the state courts to serve the state's legitimate interest:

> "I find no basis for coram nobis relief. The motion is denied. Coram nobis may not be used as a substitute for appeal" (R. p. 28).

Of course, the petitioner at the time he applied for *coram nobis* relief has exhausted his remedies of a motion for a new trial and of appeal, and had no other post conviction state remedy open to him.

Petitioner was sentenced guilty of misdemeanor, fined $500, which he paid, and got a suspended sentence of three months in a workhouse.

Petitioner seeks to clear his personal record unblemished by any other accusations for almost three-quarters of a century.

REASONS FOR GRANTING THE WRIT*

POINT I

This is an ideal case to reconsider the rule in *Herb* v. *Pitcairn*, 324 U. S. 117, that state procedural rule serving legitimate state interest bars application of federal constitutional guarantees.

No question of fact is involved in this case (Point III, *infra*, at pp. 17-19). The state courts impliedly held that the state procedural rule prohibiting the consideration of the violation of federal constitutional guarantee of due process of law in state criminal trials is a legitimate state interest. That state rule in New York fails to provide any post-conviction remedy for violation of said federal constitutional guarantee, except by a direct appeal, and prohibits a *coram nobis* application based on the same facts as appeared in the record on appeal, although the federal constitutional questions were not briefed or argued on the appeal. The problem has three aspects:

a. Shall the state procedural rules, even serving state legitimate interests, be permitted to bar the application of federal constitutional guarantees for the protection of life and liberty of a citizen;

b. Should the states be compelled to provide an adequate state post conviction procedures for the consideration of violations of said federal constitutional guarantees.

c. What is the effect on the substantive and procedural rulings of the state criminal court of the violation of due process of law on the trial of material issues demanded by the Fourteenth Amendment to the United States Constitution.

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* Italics are ours, unless otherwise indicated.

A.

The question as to said rule in *Herb* v. *Pitcairn, supra,* was recently raised in *Henry* v. *Mississippi,* 379 U. S. 443, but was not decided, because this Court there held that the procedural rule there relied on did not serve legitimate state interest. However, Mr. Justice Brennan speaking for the majority of the Court said at pages 446-7:

> "Under the view taken in Murdock v. City of Memphis, 20 Wall. 590 of the statutes conferring appellate jurisdiction on this Court, we have no power to revise judgments on questions of state law. Thus, the adequate nonfederal ground is necessary to avoid advisory opinions.
>
> *These justifications have no applications where the state ground is purely procedural.* A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right."

Mr. Justice Black, who dissented on another point, concurred with the majority on this point and said at pages 453-4:

> "Petitioner contends that his conviction was based in part on evidence obtained by an allegedly unlawful search in violation of the United States Constitution. I would decide this federal question here and now. *I do not believe that the Mississippi procedural trial rule relied on by the State can shut off this Court's review,* nor do I find a particle of support for the Court's suggestion that petitioner knowingly waived his right to have this constitutional question decided by the state trial court."

The rule in *Herb* v. *Pitcairn, supra,* so far as it relates to state procedural rule as a bar of the application of

federal constitutional or statute law was repeatedly rejected by this Court, and should be expressly overruled.

In *Davis* v. *Wechsler,* 263 U. S. 22, Mr. Justice Holmes said at page 24:

> "We are of opinion that the judgment must be reversed. Whatever springs the States may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * * The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. Ward v. Love, 253 U. S. 17, 22."

Said this Court in *Gardner et al.* v. *Teamsters etc., Union et al.,* 346 U. S. 485 at pages 500-501:

> "We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land, *and cannot be curtailed, circumvented or extended by a state procedure* * * *".

In *People* v. *Caminito,* 3 N. Y. (2) 596, the Court quashed the convictions of two appealing codefendants for violation of due process of law, but refused such relief to Noia, the third defendant, because he did not join in the appeal. In reversing unanimously in *Fay* v. *Noia,* 372 U. S. 391, this Court said at page 426:

> "* * * we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. *State procedural rules plainly* must yield to this *overriding federal policy.*"

In the same case, *United States* v. *Fay*, 300 Fed. (2) 345, U. S. Circuit Court of Appeals for the Second Circuit said at page 345:

> "There is no more unenlightened or cruel anachronism than an unbending reliance upon the niceties of procedure in derogation of substantive rights. Procedures exist, or ought to exist, for the purpose of effectuating rights, not denying them. Cf. Sheldon v. Metro Goldwyn Pictures Corp., 106 Fed. (2) 45, aff'md 309 U. S. 390. When substantive rights are clear we should be most hesitant to sacrifice those rights on the altar of local practice."

In *N. Y. Central R. R. Co.* v. *N. Y. & Pennsylvania Co.*, 271 U. S. 124, this Court said at pages 126-7:

> "The State courts were of opinion that the plaintiffs in error waived their rights by the failure to appeal from a decision on an earlier complaint to the State Commission • • •.
>
> In our opinion the failure to appeal from the former order is no bar. We do not undertake to review the decision of the Supreme Court as to State procedure, but if the railroads were too late to argue their case before that Court they are not too late to argue it here."

In *Staub* v. *City of Baxley*, 355 U. S. 313, this Court said at pages 319-20:

> "Appellee also contends that the holding of the Court of Appeals, that appellant's failure to attack 'specific sections' of the ordinance rendered it unnecessary, under Georgia procedure, 'to pass upon' the constitutionality of the ordinance, • • •.
>
> For these reasons, the ordinance, on its face, imposes an unconstitutional prior restraint upon the enjoyment

of First Amendment freedoms and lays 'a forbidden burden upon exercise of liberty protected by the Constitution. Cantwell v. Connecticut, 310 U. S. 296. Therefore, the judgment of conviction must fall."

B.

In *Case* v. *Nebraska*, 381 U. S. 336, this Court granted the writ of certiorari to decide the question whether the Federal Constitution compels the States to provide adequate post conviction procedure to consider complaints based on alleged violations of federal constitutional guarantees. While the facts as therein developed did not permit the decision on that question it was passed upon in the opinions of the Court.

Mr. Justice Clark in concurring said at page 338:

"The doctrine of exhaustion of state remedies, to which this Court required the scrupulous adherence of all federal courts * * * presupposes that some adequate remedy exists. We recognize the difficulties with which the Illinois Supreme Court is faced in adapting available state procedures to (this) requirement * * *. Nevertheless, that requirement must be met. Young v. Ragen, 337 U. S. 239 at 238-9 * * *.

There exists in some States a wide variety of procedural techniques that have been used to deal with due process attacks on criminal convictions, i.e. basic common law remedies such as habeas corpus, coram nobis and delayed motions for new trial. But the great variations in the scope and availability of such remedies result in their being entirely inadequate."

Mr. Justice Brennan, also concurring, said in the same case at page 344:

"The Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures

> an integral part of those (state) laws, and state procedures should ideally include adequate administration of these guarantees as well."

Mr. Justice Brennan in his paper on "Some Aspects of Federalism" (N. Y. University Law Review, vol. 39 (1964) said at pages 948 and 958:

> "Third, after Fay v. Noia, 372 U. S. 293, it seems clear that there is no place for rigid and technical doctrines of forfeiture, waiver or default in a system of post conviction remedies. In the absence of some deliberate bypassing or flouting of orderly procedures by a state prisoner, he is entitled to a determination of the merits of a substantial federal constitutional claim * * *."
>
> "* * * that upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted and secured by the Constitution of the United States."

All the courts of the State of New York failed in this case to fulfill this obligation. Does that mean that this Court will decline to enforce the Fourteenth Amendment of the United States Constitution when on the admitted facts herein, the conviction of the petitioner was obtained by perjured testimony of the witness produced by the prosecutor and the prosecutor's concealment of city record held by him proving perjury of his witness.

C.

The production of false witness and concealment of proof of the falsity of his evidence by the prosecution is not only an injury to the accused defendant in a criminal trial, but is a fraud on the court. That being the case, it is immaterial what the defendant does or does not do, as the administration of justice as such is defiled. Furthermore,

if the defilement results in the lack of due process during the trial, its results are immaterial. Whether such trial rests on substantive or procedural independent state grounds, it is a legal nullity and all these grounds are void.

In *Mesarosh* v. *United States,* 352 U. S. 1, this Court said at page 14:

> "Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted."

In *Sanders* v. *United States,* 373 U. S. 1, this Court said at page 8:

> "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."

In *Howell* v. *United States,* 172 Fed. (2) 213, the Court of Appeals for the Fourth Circuit said at page 215:

> "It is elementary that neither habeas corpus nor motion in the nature of application for writ of error coram nobis can be availed of in lieu of writ of error or appeal, to correct errors committed in the course of a trial, even though such errors relate to constitutional rights.
>
> It is only when there has been the denial of substance of a fair trial that the validity of the proceedings may be thus collaterally attacked or questioned by motion in the nature of petition for writ of coram nobis or under 28 U. S. C. A. 2255. Birtch v. United States, 164 F. 2d 880; Pifer v. United States, 158 F. 2d 867; Eury v. Huff, 141 F. 2d 554; Sanderlin v. Smyth, 138 F. 2d 729; United States v. Brady, 133 F. 2d 476, 481."

In *Jones* v. *Commonwealth of Kentucky,* 97 Fed. (2) 335, the Circuit Court of Appeals for the Sixth Circuit unanimously said at page 338:

> "If it be urged that the concept thus formulated but condemns convictions obtained by the state through testimony known by the prosecuting officers to have been perjured, then the answer must be that the facts of that case require, and that 'the fundamental conceptions of justice which lie at the base of our civil and political institutions' must with equal abhorrence condemn as a travesty a conviction upon perjured testimony, if later, but fortunately not too late, its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired."

Even under New York State law when *coram nobis* is based on the violation of the due process of law constitutionally guaranteed, the merits of the prosecution are immaterial.

In *People* v. *Savvides,* 1 N. Y. (2) 554, the Court said said at page 557:

> "Nor does it avail respondent to contend that defendant's guilt was clearly established or that disclosure would not have changed the verdict."

In *People* v. *Fisher,* 23 N. Y. Misc. (2) 391, the Court said at page 402:

> "The guilt or innocence of the petitioner is not in issue in this proceeding. The question of due process of law as it relates to coram nobis relief is in issue."

It follows, that all attempts to take refuge in independent state substantive or procedural rulings in a case where due process of law was disregarded during the trial are futile,

and such conviction should be set aside by this Court, as a guardian of the elementary guarantees of life and liberty under the Fourteenth Amendment to the United States Constitution.

In *Fay* v. *Noia*, 372 U. S. 391, this Court said at page 428:

> "A defendant by committing a procedural default may be debarred from challenging his conviction in the state courts even on federal constitutional grounds. But a forfeiture of remedies does not legitimize the unconstitutional conduct by which his conviction was procured * * *.
>
> In what sense is Noia's custody not in violation of federal law simply because New York will not allow him to challenge it on coram nobis or on delayed appeal?"

POINT II

Prosecutor's tender to the trial court of known perjured testimony on the only question of fact tried, withholding of exculpating documentary proof in his possession and destruction of the credibility of petitioner's written and oral testimony violated due process of law in trial of criminal cases guaranteed by Fourteenth Amendment to the United States Constitution.

Since no hearings in this case were requested by the respondent and none granted by the state courts, all the allegations of fact in the petition *coram nobis* are deemed to be true for all its purposes, and the petition is deemed to have been dismissed solely as a matter of law (see Point III next following at pp. 17-19).

The allegations of fact in the petition admitted by the respondent are as follows:

> "2. That this application is brought upon the grounds that your petitioner was denied a fair trial within the

meaning of due process * * * inasmuch as his said conviction was based on perjured testimony submitted by the people and known to have been such (R. p. 8).

"9. People in producing Walker knew that his testimony was a perjury refuted not only by the title papers themselves, but also by city records prepared and filed by Walker and his architect before any controversy arose between Walker and your petitioner * * *. So the people actively and deliberately deceived the court and obtained your petitioner's conviction by prefabricated perjurious oral proof" (R. p. 13).

"10. Your petitioner did not see the Alteration Application No. 101 before April 20, 1960, the said trial's date but after the trial inspected it for the first time at the said Building Department, and on said city record moved to set aside said conviction and for a new trial. The Court of Special Sessions denied said motion without opinion, and continued to act and rely on said perjurious testimony of Walker as shown in paragraph 3 above" (opinion of Judge Ringel at R. p. 8) (R. p. 13).

Conviction of an accused of crime by the use of false testimony, whether known to the prosecutor as such or discovered later to have been such constitutes violation of due process of law guarantee for criminal trials demanded of the state criminal courts by the Fourteenth Amendment to the United States Constitution (*Napue* v. *Illinois*, 360 U. S. 264, 271-2; *Alcosta* v. *Texas*, 255 U. S. 28; *Hysler* v. *Florida*, 315 U. S. 411).

Similarly, withholding of exculpatory city record held by the prosecutor and showing an admission by the prosecutor's false witness that on January 21, 1959 long before March, 1959 (testified to by the witness, Walker, a licensed real estate broker) he and his architect Kraus (R. pp. 11-13), both certified to the city that title to the brownstone in question was in Amcol Residences, Inc. and that the peti-

tioner had no interest therein (R. p. 12) constituted violation of due process of law guaranteed to the accused of crime in state courts by the said Amendment (*Napue* v. *Illinois,* 360 U. S. 264, 269; *Alcosta* v. *Texas,* 255 U. S. 28).

Here the trial court not only rejected the deed, mortgage and bond, the last two signed by false witness Walker, and notarized on January 8, 1959, but also the oral testimony of the petitioner and of notary, both reputable lawyers of many years standing in favor of uncorroborated false testimony of Walker, thereby denying any credibility to petitioner's written and oral proof. The trial court, in sentencing petitioner, said:

> "In imposing sentence in this case, Mr. Komar, the Court is taking into consideration that this Bench has recommended certain action by the Bar Association in your case, *as well as further investigation for further action with respect to some suspicions of perjury on the trial of this case* * * *" (R. p. 8).

Petitioner since the trial never had been informed of any investigation or of any action by the Bar Association against him.

Deprivation of credibility of an accused's proof by the prosecutor in a criminal case through the use of a false witness is also a denial of due process of law under said Amendment (*Napue* v. *Illinois,* 360, U. S. 264, 269.)

POINT III

In the absence of hearings, all facts in the petition relating to the violation of due process of law are deemed true for all purposes of *coram nobis*.

Respondent never asked for any hearings, and the state courts dismissed the application *coram nobis* of the petitioner without ordering any hearings merely as a matter of law.

When the question before this Court concerns alleged deprivations by the state courts of Federal constitutional guarantees, it makes its own examination and the estimation of the facts in the record.

In *Napue* v. *Illinois,* 360 U. S. 264, this Court said at pages 271-2:

> "The duty of this Court to make it's own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. Martin v. Hunter's Lessee, 1 Wheat. 304; Cooper v. Aaron, 358 U. S. 1; Niemotko v. Maryland, 340 U. S. 268, 271; Kern-Limerick, Inc. v. Scurlock, 347 U. S. 110, 121."

And see additional cases collected by the Court in Note 1 on page 272 of the same case.

It is settled federal rule that where no hearings are held on a petition *coram nobis* in the state courts, then for all the purposes of the proceeding all the allegations of fact in the petition are deemed true.

In *Holly* v. *Smith,* 280 Fed. (2) 536, the Court of Appeals for the Fourth Circuit said at page 537:

> "Since the petition was dismissed without a hearing, as failing to state grounds for relief, we must for the purposes of this appeal, accept as true the facts alleged in the petition along with the accompanying exhibits, which with the order of the District Court, constitute the entire record."

In Note 1 of the same case, the Court said at pages 537-8:

> "Smith v. O'Grady, 312 U. S. 329; Williams v. Kaiser, 323 U. S. 471; Tomkins v. State of Missouri, 323 U. S. 485; House v. Mayo, 324 U. S. 42; Rice v. Olson, 324

U. S. 786; Palmer v. Ashe, 342 U. S. 134; Massey v. Moore, 348 U. S. 105; Commonwealth of Pennsylvania ex rel. Herman v. Claudy, 350 U. S. 116; Cash v. Culver, 358 U. S. 633. In all of these cases, the petitioners alleged denial of their right of counsel under the Fourteenth Amendment, and, because the petitions were dismissed without hearings in the courts below, the Supreme Court accepted the allegations as true and decided the constitutional questions presented."

In *United States ex rel. Almeida* v. *Baldi,* 195 Fed. (2) 815, the Court of Appeals for the Third Circuit said at page 822:

"Under such circumstances the allegations of the petition that 'vital evidence' was wilfully concealed must be taken to be true, since no hearing was had. See Williams v. Kaiser, 323 U. S. 471."

Accord: *Conizio* v. *New York,* 327 U. S. 82, 85.

CONCLUSION

Wherefore, your petitioner respectfully prays that his petition for a writ of certiorari to the Court of Appeals of the State of New York be granted, and the said writ be issued to the said Court.

BORRIS M. KOMAR,
Petitioner.

Respectfully submitted,

BORRIS M. KOMAR,
Counsel for Petitioner,
349 East 49th Street,
New York 17, N. Y.

212-MU-8-3521.

VERIFICATION

CITY, COUNTY and STATE of NEW YORK: SS:

BORRIS M. KOMAR, being duly sworn, deposes and says:

That he is the above named petitioner; that he has read the foregoing petition and that the statements therein are true to his own knowledge.

BORRIS M. KOMAR.

Sworn to before me this
May 11, 1966.

ARTHUR PALEY,
Notary Public,
State of New York.
No. 41-3000300.
Qualified in Queens County.
Cert. filed in New York County.
Commission expires March 30, 1967.

(SEAL)